

D-4

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

June 23, 2006

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

05od-011

OAHU

Amend Prior Board Action of January 28, 2005 under Agenda Item D-8, for Grant of a 55-year Non-exclusive Easement for Seawall Purposes to Kauilani LLC, Honolulu, Oahu, Tax Map Key: 3-6-02:02 seaward.

On January 28, 2005, under agenda item D-8, the Board approved the issuance of a term non-exclusive easement to Kauilani LLC for seawall purposes.

Because the easement request was part of the sale of the private property, the seller requested the earliest possible Board presentation. The encroachment area was estimated at 303 square feet prior to the preparation of the encroachment survey map. The applicant's survey map, later verified by DAGS Survey, found the encroachment area to be only 28 square feet. Because the encroachment area was estimated to be over 100 square feet, the Board approved, and the seller paid, a \$500 fine for an unpermitted encroachment exceeding 100 square feet. (The Board approved the fine criteria on June 28, 2002, under agenda item D-17.)

Staff is requesting the references to the \$500 fine be deleted from the prior Board submittal. The \$500 fine collected will be refunded.

RECOMMENDATION: That the Board:

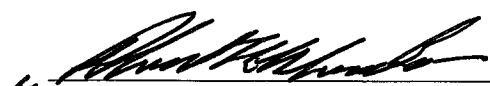
1. Amend its action of January 28, 2005, under agenda item D-8, by deleting the \$500 fine references in the Remarks and Recommendation sections.
2. Approve other terms and conditions as may be prescribed by the Chairperson to protect the State's interests.

Respectfully Submitted,



Al Jodar
Land Agent

APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

D-17

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

June 28, 2002

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

STATEWIDE

Criteria for Imposing Fine on Illegal Encroachments
Pursuant to Section 171-6(12), HRS

BACKGROUND:

On April 12, 2002, (Item D-27), when the Board considered a request for a non-exclusive term easement for seawall purposes, the Board directed staff to develop criteria on the imposing of fines for encroachments under Section 171-6, HRS, and that past Board actions on Kaneohe Bay encroachments should be reviewed for consistency with the criteria.

Pursuant to Section 171-6(12), HRS, the Board is authorized to:

- "(12) Bring such actions as may be necessary to remove or remedy encroachments upon public lands. Any person causing an encroachment upon public land shall be subject to a fine of not more than \$500 a day for the first offense and shall be liable for administrative costs incurred by the department and for payment of damages. Upon the second offense and thereafter, the violator shall (A) be fined not less than \$500 nor more than \$2,000 per day; (B) if required by the board, restore the land to its original condition if altered and assume the costs thereof; and (C) assume such costs as may result from adverse effects from such restoration;"

Encroachments are found in various situations, for example, when the abutting owner applies for a shoreline certification, when a pier owner submits the map for the lease document pursuant to the Kaneohe Bay Piers Amnesty Program or upon investigation of complaints. Encroachments can also be found in non-shoreline situation, e.g. partition wall between State and private parcels. While the shoreline encroachments are more common to be found, the following discussion applies to all types of encroachments onto public lands.

If the encroachment is along the shoreline, i.e. within conservation district, normal processing starts with obtaining comments from the Coastal Land Program staff (CLP). CLP staff reviews a

as amended

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ITEM D-17

June 28, 2002

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questionnaire completed by the applicant and determines what course of action is appropriate according to established criteria aimed at protecting beach resources and public access to those resources. Subject to CLP's review, staff will request Board approval for the issuance of a term non-exclusive easement covering the encroachment. Some of the encroachments may be exempted from filing a Conservation District Use Application because they existed legally prior to date (1964) of enactment of the Conservation District Land Use law. Historically, as a matter of practice, staff would recommend that the Board impose a fine of \$500 for encroachment onto public lands pursuant to Section 171-6(12), HRS.

For the Board's information, the Planning Branch has implemented a penalty schedule for the Hearing Office Administrative Penalty System (HOAPS) for violation of the Conservation District land use law. First, no shoreline structures built after August 27, 1999 (the date the Board adopted amendments to the Coastal Erosion Management Plan) will be processed through HOAPS. For all others, a maximum fine of \$500 will be imposed for any encroachment, regardless of size and date (before August 27, 1999), found in location where the beach resources are determined to be excellent or good. For areas in which the beach resources are determined to be fair or poor, a sliding scale according to the size and date of the encroachment is used. The Planning Branch uses the effective dates of October 1, 1964 (establishment of the Conservation District) and June 22, 1981 (establishment of Chapter 13-2, Hawaii Administrative Rules) for this sliding scale as follows:

- \$500 for more recent encroachments (June 22, 1981 – August 27, 1999) regardless of size
- \$100 for long-established encroachments (October 1, 1964 – June 22, 1981) but under 20 square feet
- \$250 for long-established encroachments (October 1, 1964 – June 22, 1981) over 20 but under 100 square feet
- \$500 for long-established encroachments (October 1, 1964 – June 22, 1981) over 100 square feet

REMARKS

Staff provides some common situations in the following paragraphs regarding the encroachments and our responses to each which result in a general guideline for staff to follow when recommending the amount of encroachment fines to the Board. All applicants subject to a fine may appeal to the Board to reduce or waive the fine recommended by staff.

Age of the Encroachment

Some applicants may claim that the encroachment has been in existence for a long time and no one ever told them that they are encroaching on State lands. Now, maybe due to their application for a shoreline certification, the State notifies them they have an encroachment which has to be resolved before the shoreline can be certified. Due to the lengthy existence of the encroachment, these owners may say they should not be fined.

Response: Staff's position is that the age of the encroachment is irrelevant. A similar argument can be made by a person speeding on the roads who says that he has driven over the speed limit for years and was never caught. Just because the violator was never caught does not excuse him from the law. In fact, in the case of encroachments, the owner has been enjoying the use of public lands without payment of any rent which could lead one to argue, the older the encroachment, the higher the fine.

Staff, however, feels that the amount of the fine should not be based on the age of the encroachment.

Size of Encroachment

The Board's request to staff to examine criteria for the imposing of fines arose from a situation where staff had stated the encroachment appeared to be due to "survey error." Although staff inquired with DAGS Survey Division as to whether they would be able to make such a determination, they responded that they would not feel comfortable making such statements.

Staff then looked at how encroachments are handled on private lands. Under Section 669-12, HRS, a de minimis structure position discrepancy on private lands shall not be considered as an encroachment or zoning violation. Section 669-11, HRS, defines such discrepancy as, for conservation property, 1.5 feet between the location of an improvement legally constructed along what was reasonably believed to be the boundary line and the actual location of the boundary line based on the most recent survey. Further, different limits of de minimis structure are provided in Section 669-12, e.g. 0.5 feet in a residential zone. However, Section 669-13 stipulates that this part of the law shall not apply on any public lands, and staff notes that we are only referring to the de minimis rule for the purpose of setting criteria for fines for encroachments.

Response: Anyone who encroaches onto State lands will have to either remove the encroachment or obtain an easement from the State as there is no de minimis rule for public lands. Staff would reiterate that the subject submittal is only for imposing of fines. Any applicant, subject to the Board's approval, who is exempted from paying a fine on the encroachment, will still have to obtain an easement from the Board.

Staff has come across some minor encroachments in terms of area. In these cases, the owners appeared to have acted in good faith to ensure the structure was built within their property lines by hiring a licensed surveyor. However, staff believes that the equipment and technology used in the old days may be one of the reasons why a small encroachment occurred. Therefore, staff thinks we should establish some figures to deal with these relatively minor encroachments.

To use the shoreline encroachment as an illustration, if we assume 50 feet is the average distance of the property line abutting the shoreline, a 1.5 feet (1.5 feet is considered a de minimis structure in conservation district) encroachment will

result in an area of 75 square feet. To provide some leeway, staff suggests using 100 square feet as the ceiling. For any encroachment less than or equal to 100 square feet, staff would not recommend any fine. For any encroachment over 100 square feet, staff would recommend a fine of \$500.

Applicant Did Not Construct Encroachment

The encroachment, which could be a portion of a seawall, ramp, or steps, existed on the property prior to the purchase by the current owners. When staff has recommended imposing a fine in the past, these owners have argued that whoever built the encroachment should be fined and that they should not be fined because they did not create the encroachment.

Response: Staff believes fining the current owner is appropriate. Section 171-6(12), HRS, states that any person causing an encroachment shall be subject to a fine. The current owner is "causing" the encroachment by its very existence. Also, prior to the closing of any transaction, they should have a survey of the property. If any encroachment is found, the buyer and seller would resolve the issue before the transaction is consummated. Therefore, we would recommend that the applicant seek legal advice whether they can go after the seller or realtor for the loss or expense that they have to spend on the encroachment, which would include the fine and easement consideration. Further, if we only fine encroachments where we have to prove, in addition to the fact that there is an encroachment onto public lands, who erected the encroachment, this would seriously hamper our enforcement authority. Therefore, staff recommends the Board continue imposing fine for encroachment notwithstanding who actually erected the encroachment.

Double Fines

Sometimes, when the CLP staff determines the encroachment is in violation of the Conservation District law, the case will be referred to the HOAPS and the applicant is required to pay a fine and administrative charges. Then, the applicant is required to file an after-the-fact CDUA for the encroachment. Upon the approval of the CDUA, staff will process a request for easement. In the submittal for the issuance of an easement, staff will follow the prevailing policy and recommend a fine pursuant to Section 171-(6)(12). Some people may argue that imposing a fine on the same structure twice is not fair.

Response: Staff responds by saying that two separate laws were violated. For encroachments on public lands, we reiterate that the applicant may have had use of the public lands for a lengthy period of time without compensation.

Previous Fines under Kaneohe Bay Piers Amnesty Program

In the past, the Board approved the issuance of encroachment easements for some Kaneohe Bay pier owners. The Board waived the fine for an applicant, Mr. Joseph Phillips, on April 12, 2002 based on staff's findings that there could be a survey error due to the less modernized equipment and technology existing at the time the seawall was built. To be consistent with the proposed criteria in the subject submittal and the directives by the Board when the case of Mr. Phillips was

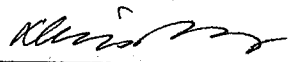
considered, staff will be bringing back amendments to prior actions for Kaneohe Bay pier owners where the fine amount does not conform to the recommendations of this submittal. Staff notes that we will be going back and reviewing only prior actions of Kaneohe Bay Amnesty Program participants.

RECOMMENDATION:

That the Board affirm that the staff will recommend fines for encroachments under Section 171-6, HRS, as follows:

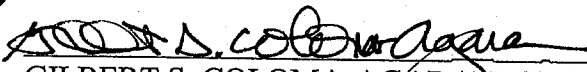
- A. No fines for encroachments 100 square feet or less;
- B. A fine of \$500 for encroachments more than 100 square feet.

Respectfully Submitted,



DIERDRE S. MAMIYA
Administrator

APPROVED FOR SUBMITTAL:



GILBERT S. COLOMA-AGARAN, Chairperson

APPROVED AS AMENDED. The Recommendation Section was amended by adding that staff will also provide information on the history of the encroachment and any evidence of intent.